



In Brief

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A More Perfect Union

Amending the United States Constitution

Members of the United States Congress could vote this year on as many as five proposed amendments to the United States Constitution, which has been altered just 27 times since its ratification in 1788.

Senator John Cornyn, R-Texas, chairs the Senate Judiciary Committee's Subcommittee on the Constitution, Civil Rights, and Property Rights, a role which places the freshman senator on the front lines of legislative debate on a host of controversial proposals to amend the nation's foundational document.

Among the proposed amendments are measures to protect the national flag from physical desecration, to define marriage as being between one man and one woman, and a Cornyn-sponsored proposal to provide for congressional continuity in the event of a catastrophic terrorist attack or disaster.

AN INSTRUMENT OF THE PEOPLE'S WILL

University of Houston political science professor Donald Lutz has written that "One cannot control the future through a constitution. One can only structure that future to a certain degree by making it an extension of the past, which means making it an effective instrument of the people's long-term will."¹

Lutz asserts that a constitution should:

- Define citizenship, providing a basis for determining who is and who is not to be included among "the people."
- Express the fundamental values, goals, and commitments of the people.
- Lay out institutions for collective decision-making that in their design and operation are congruent with the fundamental values, goals, and commitments of the people.
- Establish the basis for the authority of the government.
- Distribute political power.
- Enable the government to efficiently handle conflict and reach effective public policies.
- Express the solutions to major conflicts and problems that have already been effectively worked out.
- Limit government power.²

*We the People
of the United States,*

*in order to form a more perfect
Union, establish Justice, insure
domestic Tranquility, provide
for the common Defense, promote
the general Welfare, and secure
the Blessings of Liberty to
ourselves and our Posterity, do
ordain and establish this
Constitution for the United
States of America.*



If Lutz is correct, then proposed amendments seemingly should fit into the rubric of the original document. There are numerous reasons why an amendment might be proposed: to satisfy a perceived deficit in the Constitution, as with the 10 amendments which formed the Bill of Rights; in response to a controversial court decision, as with the 11th Amendment when Congress felt the Supreme Court had overstepped its bounds in the case of *Chisholm v. Georgia* regarding lawsuits; or to advance a controversial social issue, as in the attempt to outlaw the manufacture, sale, and transportation of intoxicating liquors through the 18th Amendment.

Advancing a controversial social issue, some argue, is precisely what a constitutional amendment should not do. Scholars and critics note that the 18th Amendment was repealed slightly more than a decade later by the 21st Amendment. A failed social experiment, the 18th Amendment remains the only amendment ever to be repealed. Opponents of the proposed Federal Marriage Amendment, which would ban same-sex marriage, point to the example of the 18th and 21st amendments to bolster their claim that the United States Constitution should not be used for social engineering.

Supporters of such a ban might counter that rather than a social experiment along the lines of Prohibition, the Federal Marriage Amendment is more closely linked to the 11th Amendment as a reaction to a court decision which exceeds the role of the judicial system.

AMENDING THE CONSTITUTION

Amending the United States Constitution is a difficult process. Article V of the Constitution provides that an amendment may be proposed by an affirmative vote of two-thirds of each house of Congress (currently 290 of 435 representatives and 67 of 100 senators) or by a “Convention for Proposing Amendments” created on application by the legislatures of two-thirds of the states. Once an amendment is proposed by Congress or by a national convention it must be ratified by three-fourths of the states (currently 38 of 50). The president cannot veto a proposed amendment and has no role in the amendment process, other than the use of the proverbial “bully pulpit” to rally public sentiment for or against the measure.

After a proposed amendment is submitted to the states, ratification can take place in one of three ways:

- The state legislature may take up the measure;
- The state legislature may call for a constitutional convention to consider the measure, with the composition of the convention determined by the individual state. A convention may contain legislators, non-legislators, or a mix of the two, but is a separate body from the legislature; or
- Congress may specify that the measure is to be considered by a constitutional convention in each state. Congress has mandated such a procedure only once, in the case of the 21st Amendment which repealed the 18th, or Prohibition, Amendment.

There have been attempts to submit constitutional amendments to the electorate for a vote, notably on the 18th Amendment, but the United States Supreme Court ruled in 1920 in *Hawke v. Smith* that a popular referendum is not a substitute for action by either the legislature or a convention. Neither can a referendum be held to approve or disapprove of the legislature’s or a convention’s decision on an amendment.

If a state chooses to hold a convention to consider a proposed amendment, rather than having the amendment considered by the legislature, it is up to the state to determine the composition of the convention. New Mexico law, for example, specifies that each member of the legislature is a member of the convention,

which must meet within 10 days of the date that the proposed amendment is submitted to the states for ratification. In Vermont the governor, lieutenant governor, and speaker of the house select 28 citizens, 14 of whom are in favor of ratification and 14 opposed, to be placed on a ballot with their position on the amendment clearly noted. Vermont voters then elect 14 of the candidates to serve as delegates to the convention.¹

Florida law provides for a convention of 67 delegates, elected from a field in which anyone who meets the qualifications for the state House of Representatives, pays an application fee of \$25, and submits a 500-name petition is eligible to run.²

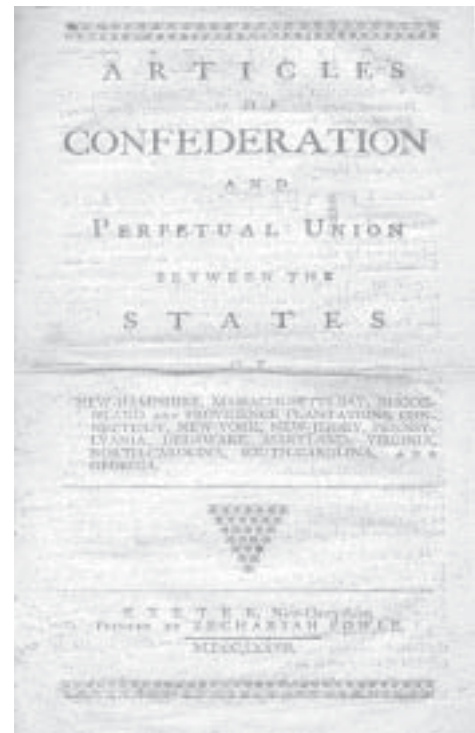
Texas statutes do not address the manner in which federal constitutional amendments are to be ratified. The Rules of the Texas House of Representatives require that ratification take the form of a joint resolution approved by a majority vote. An explanatory note to Rule 9, Section 2, of the House Rules states that “It has been the custom to present such proposals for ratification in the Texas Legislature through the vehicle of a joint resolution, but since nothing exists to the contrary, such a resolution can be passed by a majority vote of each house, the two-thirds vote requirement . . . not being applicable.”⁵

ARTICLES OF CONFEDERATION

Although the process of amending the Constitution is a difficult one, the men who drafted the Constitution learned from the example of the Articles of Confederation, which governed the new nation from 1782 to 1789. Because amending the Articles of Confederation required unanimous consent from the states, a negative vote by one house in one state legislature would kill any proposed amendment, thus making it a virtual certainty that the Articles would never be amended even with overwhelming popular and legislative support for such an amendment.

In drafting the new Constitution, delegates to the Constitutional Convention ensured that the gridlock of the Confederation years would be avoided, or at least minimized, while still protecting the Constitution from political vagaries by providing that ratification of any Constitutional amendment would require an affirmative vote by two-thirds of each house of Congress and approval by three-fourths of the states.

Ratification of the Constitution itself also required the approval of three-fourths of the states, or nine of the 13 states, which was achieved when New Hampshire ratified the document on June 21, 1788; by May 29, 1790, all 13 states had voted for ratification. Vermont gained a footnote for itself when it ratified the Constitution in 1791 and became the 14th state under an Act of Congress that “received and admitted [Vermont] into the Union as a new and entire member of the United States.” Since that time, no newly admitted state has been required to ratify the Constitution but states do vote on any amendments proposed subsequent to their admission.





Almost immediately after ratification of the Constitution, in September 1789, Congress sent 12 proposed amendments to the states for ratification. Ten of the 12 articles were accepted by enough states to ensure ratification and became Amendments 1 through 10, known today as the Bill of Rights. The second article, relating to Congressional pay increases, which failed to be adopted in the 18th century, was eventually ratified as the 27th Amendment in 1992.

In the 215 years since the Bill of Rights was drafted by Representative James Madison, almost 11,000 measures to amend the Constitution have been introduced in Congress; only 33 of those have been approved by Congress and submitted to the states for ratification. Twenty-seven of the 33 proposed amendments have been ratified. Among those which failed to be ratified were the Equal Rights Amendment (ERA), sent to the states in 1972, and the District of Columbia Voting Rights Amendment, which was sent to the states in 1978.

No proposed amendment has gone to the states since 1978, but four amendments which contained no expiration date for ratification are still outstanding, including one on child labor which was submitted to the states in 1926 and has been ratified by 28 of the requisite 38 states. Early amendments contained no expiration date for ratification, which is why an amendment first submitted to the states in 1789 remained viable until its ratification as the 27th Amendment in 1992, but recent proposed amendments have usually contained a phrase requiring that the amendment expire if it fails to be ratified within seven years.

POTENTIAL CONSTITUTIONAL AMENDMENTS

Every session of Congress sees the introduction of a number of potential constitutional amendments, numbering in the thousands over the last 200 years. More than 60 have been introduced in the current 108th Congress, while the 101st Congress (1989-1990), with 214 submissions, may have hit a modern high-water mark for proposed amendments. Among the measures introduced in the last decade are proposals to amend the Constitution to:

- Guarantee the right to use the word “God” in the Pledge of Allegiance and the national motto (108th Congress);
- Specify a right to “equal high quality” health care (107th Congress);
- Allow any person who has been a citizen of the United States for 20 years or more to be eligible for the presidency (107th Congress);
- Declare that life begins at conception and that the 5th and 14th Amendments apply to unborn children (106th Congress);
- Provide for the reconfirmation of federal judges every 12 years (105th Congress);
- Repeal the 16th Amendment and specifically prohibit an income tax (104th Congress);
- Enable or repeal federal laws by popular vote (103rd Congress); and
- Provide for a run-off presidential election if no candidate receives more than 50 percent of the popular vote (103rd Congress).

Senator Cornyn wrote in the *National Review* that “The American people must be able to rely on a functioning Congress in the event of a catastrophic terrorist attack. . . . But the Constitution does not provide adequate mechanisms to ensure a continuing, functioning Congress if a majority of members is killed or incapacitated as the result of a terrorist attack.

“To protect the American people and ensure a functioning Congress, we must find a way to bridge this gap. . . . I propose a constitutional amendment to authorize Congress to enact laws providing for constitutional succession.”⁶

**Senator John Cornyn
November 5, 2003**



FEDERAL AMENDMENTS CONSIDERED IN TEXAS

The Constitution and the first 12 amendments to it were ratified prior to Texas's admission to the Union in 1845. Since 1845, a total of 19 amendments have been submitted to the states by Congress and 15 have been ratified.

The first four amendments proposed by Congress after 1845 were a part of the unrest of the Civil War era. In 1861, in what many considered a last-minute effort to stop southern states from seceding over the issue of slavery, Congress proposed an amendment to prohibit the federal government from making any law which interfered with the domestic institutions of any state. Known as the Corwin Amendment, after its sponsor, Representative Thomas Corwin of Ohio, the amendment was ratified by only two states: Maryland and Ohio; Texas never voted on the amendment. Because it contained no expiration date, the amendment is still outstanding.

At the end of the Civil War, Congress proposed three amendments and required the former Confederate states to ratify those amendments as a condition of their readmission to the Union. Those proposals, which became the 13th, 14th, and 15th Amendments, were ratified by Texas in February 1870 in a provisional session of the 12th Texas Legislature called for that purpose.

Despite the agitation and turmoil of the time, the three amendments were overwhelmingly supported by legislators, perhaps because the legislature consisted almost entirely of African Americans and Anglo supporters of the Union; men who had "taken part in the late Rebellion" were ineligible to serve in public office or even to vote in elections. Each of the amendments passed easily; the least popular measure, the 15th Amendment, which guaranteed the right to vote regardless of "race, color, or previous condition of servitude," received 86.34 percent of the vote.

Representative William Hughes of Weatherford, one of only 10 legislators to vote against the 15th Amendment, recorded in the House Journal the reasons for his vote.

I dissent from the ratification of this Fifteenth Amendment because I oppose it in principle, as it robs my State of the last vestige of State sovereignty, and gives to the Federal Government (by implication, at least) control of that priceless jewel of democratic government — individual suffrage; and because, I believe, a majority of the people whom I represent are not voluntarily in favor of its ratification.

I cast my vote against it for the further reason that the political sentiment of this body is such as to insure [sic] its ratification, thereby in effect reducing my deliberations to the simple question of principle.⁷

Representative William Hughes, 1870

In subsequent decades, the 16th, 17th, 20th, 25th, and 27th Amendments were also easily ratified; the 18th Amendment, concerning Prohibition, was passed on a non-record vote in 1918.

Only three amendments garnered much opposition from Texas lawmakers, though two of them still passed by margins of more than four-to-one. Seventeen percent of House members opposed the 19th Amendment, affirming the right of women to vote. Thirteen percent of the Senate and 16 percent of the House opposed the 22nd Amendment, which limited presidents to two full terms in office. The 26th Amendment, which lowered the voting age to 18, drew the most opposition. Almost 20 percent of the Senate and 29 percent of the House opposed that measure in 1971.



Texas legislators never voted on either the 23rd Amendment, granting residents of the District of Columbia the right to vote in presidential elections, or on the 24th Amendment, which abolished the poll tax. Texas did not stand alone in slighting the 24th Amendment. Of the 11 former Confederate states, only Florida voted to ratify the measure. Virginia voted in favor of the 24th Amendment 13 years after it had been declared by the federal government to have been ratified, while Mississippi rejected it outright.

Of the six proposed amendments which have not been ratified by the states, two were proposed prior to Texas's admission to the Union, one in 1791 and one in 1810; while those two proposals remain outstanding, Texas joins the majority of states in never having considered them. The Corwin Amendment, ratified by only two states, also remains outstanding and Texas again joins the majority of states in never having voted on it.

The Anti-Child Labor Amendment proposed in 1926 was ratified by 28 states; with no expiration date it remains outstanding. Texas has not voted on the measure nor on the District of Columbia Voting Rights Amendment, which was proposed in 1978 and died in 1985 after being ratified by only 16 of the requisite 38 states.

The only other amendment which reached its expiration date without gaining ratification from three-fourths of the states was the proposed Equal Rights Amendment, ratified by 35 of the necessary 38 states. Texas lawmakers voted overwhelmingly to ratify the amendment in early 1973, shortly after it was proposed by Congress.

CONCLUSION

The United States Constitution is the oldest national constitution and, 215 years after its ratification, remains one of the shortest. Its drafters, who included James Madison and Benjamin Franklin, fashioned a flexible document that would serve an evolving society by making it possible to amend the Constitution but setting in place a rigorous process by which such amendments would be made.

The Constitution has been amended 27 times, most recently in 1992. It is virtually certain to be amended again in the future. Article VI declares that "This Constitution . . . shall be the supreme law of the land; and the judges in every state shall be bound thereby. . . ." Whether the next amendment to be ratified protects the flag, defines marriage, or addresses an issue as yet unconceived, the Constitution will remain the people's best hope for a more perfect union.

-by David Mauzy, SRC



The five proposed amendments most likely to be voted on by Congress this year are SJRs 1, 4, 23, and HJR 22:

Senate Joint Resolution 1**by Senator Jon Kyl, R-Arizona**

SECTION 1. The rights of victims of violent crime, being capable of protection without denying the constitutional rights of those accused of victimizing them, are hereby established and shall not be denied by any State or the United States and may be restricted only as provided in this article.

SECTION 2. A victim of violent crime shall have the right to reasonable and timely notice of any public proceeding involving the crime and of any release or escape of the accused; the rights not to be excluded from such public proceeding and reasonably to be heard at public release, plea, sentencing, reprieve, and pardon proceedings; and the right to adjudicative decisions that duly consider the victim's safety, interest in avoiding unreasonable delay, and just and timely claims to restitution from the offender. These rights shall not be restricted except when and to the degree dictated by a substantial interest in public safety or the administration of criminal justice, or by compelling necessity.

SECTION 3. Nothing in this article shall be construed to provide grounds for a new trial or to authorize any claim for damages. Only the victim or the victim's lawful representative may assert the rights established by this article, and no person accused of the crime may obtain any form of relief hereunder.

SECTION 4. Congress shall have power to enforce by appropriate legislation the provisions of this article. Nothing in this article shall affect the President's authority to grant reprieves or pardons.

SECTION 5. This article shall be inoperative unless it has been ratified as an amendment to the Constitution by the legislatures of three-fourths of the several States within seven years from the date of its submission to the States by the Congress. This article shall take effect on the 180th day after the date of its ratification.

Senate Joint Resolution 4**by Senator Orrin Hatch, R-Utah**

"The Congress shall have the power to prohibit the physical desecration of the flag of the United States."

Senate Joint Resolution 23**by Senator John Cornyn, R-Texas**

"The Congress may by law provide for the case of death or inability of Members of the House of Representatives, and the case of inability of Members of the Senate, in the event that one-fourth of either House are killed or incapacitated, declaring who shall serve until the disability is removed, or a new Member is elected. Any procedures established pursuant to such a law shall expire not later than 120 days after the death or inability of one-fourth of the House of Representatives or the Senate, but may be extended for additional 120-day periods if one-fourth of either the House of Representatives or the Senate remains vacant or occupied by members unable to serve."

Senate Joint Resolution 30**by Senator Wayne Allard, R-Colorado**

"Marriage in the United States shall consist only of the union of a man and a woman. Neither this Constitution, nor the constitution of any State, shall be construed to require that marriage or the legal incidents thereof be conferred upon any union other than the union of a man and a woman."

**House Joint Resolution 22****by Representative Ernest Istook, Jr., R-Oklahoma**

SECTION 1. Total outlays for any fiscal year shall not exceed total receipts for that fiscal year, unless three-fifths of the whole number of each House of Congress shall provide by law for a specific excess of outlays over receipts by a roll call vote.

SECTION 2. The limit on the debt of the United States held by the public shall not be increased, unless three-fifths of the whole number of each House shall provide by law for such an increase by a roll call vote.

SECTION 3. Prior to each fiscal year, the President shall transmit to the Congress a proposed budget for the United States Government for that fiscal year in which total outlays do not exceed total receipts.

SECTION 4. No bill to increase revenue shall become law unless approved by a majority of the whole number of each House by a roll call vote.

SECTION 5. The Congress may waive the provisions of this article for any fiscal year in which a declaration of war is in effect. The provisions of this article may be waived for any fiscal year in which the United States is engaged in military conflict which causes an imminent and serious military threat to national security and is so declared by a joint resolution, adopted by a majority of the whole number of each House, which becomes law.

SECTION 6. The Congress shall enforce and implement this article by appropriate legislation, which may rely on estimates of outlays and receipts.

SECTION 7. Total receipts shall include all receipts of the United States Government except those derived from borrowing. Total outlays shall include all outlays of the United States Government except for those for repayment of debt principal.

SECTION 8. This article shall take effect beginning with the later of the second fiscal year beginning after its ratification or the first fiscal year beginning after December 31, 2008.

¹ Lutz, Donald S., "Cautions For Constitution-Makers," Independence Institute Issue Paper 12-1987, August 3, 1987.

² Ibid.

³ Mount, Steve, "Constitutional Topic: Ratification Conventions," U.S. Constitution Net, www.usconstitution.net/constop_acon.html.

⁴ Ibid.

⁵ House Rules, 78th Texas Legislature, 2003, Rule 9, Section 2, p. 166.

⁶ Cornyn, John, "Planning For the Unthinkable," National Review Online, November 5, 2003, www.nationalreview.com/comment/cornyn200311050737.asp.

⁷ Journal of the Texas House of Representatives of the State of Texas, Provisional Session of 1870, p. 33.

